THE ABC'S OF LITIGATING WAGE & HOUR COLLECTIVE AND CLASS ACTIONS

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I. INTRODUCTION

Litigating wage and hour class and collective actions can pose challenges for plaintiffs' counsel. There are numerous procedural and strategic aspects of litigation to consider. This paper will discuss the basic procedural steps of a class and collective action and strategies for efficiently and successfully working through those steps. Specifically, this paper will cover general strategies that may be useful during the following stages of litigation: (1) pre-filing; (2) complaint filing; (3) moving for conditional certification; (4) case scheduling; (5) discovery; (6) motion practice; (7) trial; and (8) settlement.

II. PRE-FILING STEPS AND STRATEGIES

A. Thorough Investigation, Bearing in Mind the Ticking Statute of Limitations

The more investigation and preparation plaintiffs' counsel can undertake before filing the complaint, the better positioned counsel will be for the critical conditional and class certification filings. This must be balanced, however, against the running of the statutes of limitations under the Fair Labor Standards Act ("FLSA") and any state wage laws being asserted. Each additional week of investigation is a week that is lost for purposes of defining the class under Fed. R. Civ. P. 23. And the FLSA statute of limitations continues to run for each individual until he or she files an opt-in form agreeing to join the case. Because the statute of limitations is running, the

investigation should be efficient, and it may be necessary to file earlier than in a case where the statute of limitations is not causing a day-by-day reduction of damages and, potentially, claims.

For the complaint to be the detailed, thoroughly vetted, and persuasive document that it should be, significant pre-filing investigation is necessary. The potential named plaintiffs are typically the main source of information—every fact related to the claims at issue should be discussed carefully with them. If the claim involves misclassification and job duties, the plaintiffs' counsel should learn the nature of the job inside and out. Whatever documents the potential named plaintiffs possess that are relevant to the claim should be gathered and reviewed (provided that no breach of the company's confidentiality rules occurs). For example, employee handbooks, sample wage statements, offer/acceptance letters, employment evaluations, and policies or procedures governing the employee's duties are important to review. Often a wealth of documents can be obtained by sending (or suggesting that the employee send) a request for a copy of the employee's personnel file, to which the employee will be entitled under some states' laws (*e.g.*, Cal. Lab. Code §§ 226(b), 432, 1198.5). This latter step, however, may reveal to the company that the employee is considering bringing a claim.

The investigation should uncover as much information as possible about the potential wage violations being asserted—i.e., where the violations occur, who the relevant players are, how the company is organized, whether there is documentary proof, and so on. If the case is an exemption case, for example, it is helpful to speak at length with a number of employees to understand in detail the nature of their jobs, the tasks they perform each day, the level of responsibility they have, or whatever facts are relevant under the applicable exemption regulations.

Researching the company itself is important. Plaintiffs' counsel should check for other litigation involving the company. Publicly available documents filed in other litigation may give great insight into the structure of the company. For example, if the company or an affiliate has filed corporate disclosure notices in other litigation, those documents may describe any relevant parent/subsidiary corporate relationships that will help identify the correct defendant(s). If the company is publicly traded, its SEC filings (available on EDGAR) may provide voluminous information.

Vetting potential named plaintiffs is also very important. Of course, the named plaintiffs must be typical for Rule 23 purposes. Beyond that, litigating the case will be easier if the named plaintiffs are responsive, enthusiastic, and credible. Plaintiffs' counsel may wish to inquire about prior litigation history, bankruptcy filings, any individualized claims against the employer, and any misconduct at the employer, as such issues could distract from the issues in the case or create adequacy hurdles under Rule 23. The more compelling the individual plaintiff's facts, the better.

As plaintiffs' counsel performs outreach to additional potential opt-in plaintiffs and determines how the class will be defined, the process of investigating the claims will continue.

B. Investigation to Prepare for Defining the Class(es)

Prior to drafting the complaint, plaintiffs' counsel will need to do an investigation to determine

where to bring the case, whether to file FLSA and/or state claims, and which states' laws should be asserted under Rule 23.

If there are potential named plaintiffs in multiple jurisdictions, research may be necessary to find the most advantageous forum. There may be differences among circuit court decisions pertaining to the claim that will counsel in favor of filing in one circuit or another.

In order to decide whether to file a hybrid Rule 23 and FLSA action, plaintiffs' counsel must discover where the relevant employees are located, and in what numbers. If there are employees in multiple states where there are wage laws at issue, plaintiffs' counsel may wish to investigate whether the employees in each such state are sufficiently numerous to bring Rule 23 claims under that state's laws. Additionally, in certain industries, employees may face practical barriers or have worries related to affirmatively joining a case. In such circumstances, a Rule 23 class may be far superior to merely bringing a FLSA claim and may result in greater overall benefit to the employees at issue. *See* *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 312 (D. Mass. 2004) ("[T]he class members' failure to opt in does not imply that the class members themselves consider individual action to be superior to a class action. Instead, it suggests that many of the class members lack the individual incentive to bring suit, making a class action superior.").

If a nationwide FLSA claim is a possibility, plaintiffs' counsel will want to investigate whether the violation is such that all employees nationwide will be sufficiently similarly situated to be certified as a collective action. This may necessitate speaking with potential opt-in plaintiffs located throughout the country.

Whether plaintiffs' counsel eventually decides to file an FLSA, Rule 23, or hybrid action, investigation may be necessary to determine the proper definition of the class. For example, if there are similar but different job titles potentially implicated by the claims, plaintiffs' counsel will want to learn enough to know whether to include the different groups in one class, use sub-classes, or omit certain groups altogether.

C. Investigatory Outreach and Finding Opt-In Plaintiffs

To perform the foregoing investigation, it is often necessary to reach out to potential witnesses, some of who will be potential opt-in plaintiffs. At the outset, it is important to be aware of two ethics rules: the rules governing solicitation, and the rules governing contact with represented parties. Because such investigations often entail contact with individuals in multiple jurisdictions, plaintiffs' counsel must be absolutely clear about the rules that apply in each jurisdiction. For example, an attorney in California is always governed by the California Rules of Professional Conduct, but if she communicates with an individual in another state, she likely must comply with both sets of rules. Rules often contain provisions about which set of rules will govern if two jurisdictions' rules apply.

1. Solicitation Rules

The rules governing solicitation likely apply to affirmative communications with potential opt-in plaintiffs urging them to join a case. As a general matter, solicitation of potential clients by

telephone is not permitted; whereas, solicitation in writing is permitted, but only if the writing conforms to specified requirements that vary by state. *See, e.g.*, ABA Model Rule 7.3. The requirements often vary widely, and in some states there are different requirements for different mediums of the communication (*e.g.*, mail vs. email). Many states require the communication to be labeled as an advertisement and to comply with a list of requirements designed to ensure that the communication is not misleading. Other states have unique and more onerous requirements. For example, when an out-of-state attorney sends a solicitation to someone in New York, "[a] copy of the solicitation shall at the time of its dissemination be filed with the attorney disciplinary committee of the judicial department where the solicitation is targeted." N.Y. R. Prof. Cond. 7.3(c); *see also* Tex. Discipl. R. Prof. Cond. 7.07 (requiring attorney to send copy of written solicitation to the Advertising Review Committee of the Texas Bar, along with a "completed lawyer advertising and solicitation communication application form" and a check or money order payable to the State Bar of Texas). Nearly all states require copies of solicitation letters to be preserved for specified periods of time.

If a telephone communication with a potential opt-in plaintiff is conducted for the sole purpose of investigation (*e.g.*, into the various categories of information described above), it may be advisable to prepare a script detailing exactly what plaintiffs' counsel will be asking, which can help defend against any later accusations of improper solicitation. *See, e.g.*, *Piper v. RGIS Inventory Specialists, Inc.*, No. C-07-00032 (JCS), 2007 WL 1690887 (N.D. Cal. June 11, 2007) (concluding based upon a script that plaintiffs' counsel acted properly).

2. Rules Regarding Communications with Represented Parties

The rules regarding communications with represented parties typically apply when communicating with current managers, the idea being that managers with a certain level of authority or ability to make binding admissions on behalf of the company are represented by the company's lawyers and, thus, should be contacted through counsel. Again, the rules will vary from state to state. In California, for example, the rule applies only to *current* managers, making it permissible to contact former managers directly for investigatory purposes. *See* Cal. R. Prof. Cond. 2-100(b). Because manager witnesses can often be enormously helpful in wage and hour class cases, it is important to investigate whether there such witnesses exist who could support the claims.

If the manager is a current employee, then plaintiffs' counsel will have to review the rules carefully to determine whether the individual qualifies as a represented party. If the attorney concludes that the individual is not a represented party, it is good practice to begin any conversation by confirming the facts that gave the attorney that impression. Note that whether a case is pending in state or federal court can affect the analysis of whether a current manager may be contacted directly. *See, e.g.*, *U.S. v. Sierra Pacific Industries*, 857 F. Supp. 2d 975, 981 (E.D. Cal. 2011) (explaining that the "party admission" rule of the Federal Rules of Evidence resulted in a particular manager being a "represented party," even though a different outcome might have applied if the case had been pending in state court).

3. Finding Opt-In Plaintiffs

Finding opt-in plaintiffs is an important step in an FLSA case. In order to win conditional certification, a number of declarations will often be needed, and a factor in the conditional certification analysis may be the degree of enthusiasm for a collective action, as evidenced by the number of opt-in plaintiffs. *See, e.g.*, *Harris v. Vector Mkt'g Corp.*, 716 F. Supp. 2d 835 (N.D. Cal. 2010). Although the effort to find opt-in plaintiffs will typically continue (and may become easier) after an action is filed, filing numerous consent forms from opt-in plaintiffs with the complaint shows strength to the court, the defendant, and other employees thinking of opting in.

One method of finding opt-in plaintiffs is to identify employee names and addresses and send a solicitation letter in compliance with the above-discussed ethics rules. The potential named plaintiff(s) may be the best initial source of the names of other employees who might be interested in opting into the case. Once names are provided, addresses can often be located on various internet search sites. It is also often possible to learn the names of potential opt-in plaintiffs through simple internet searches. Some categories of employees, for example, have contact information that must be publicly available by law and that may be searchable by company, such as real estate appraisers. *See e.g.*, http://www.orea.ca.gov/html/SearchAppraisers.asp. Sales-related employees, too, are sometimes identified on sales-specific websites. Further, each opt-in is a source of additional potential opt-ins.

Taking the foregoing steps will lay a solid foundation for preparing the complaint.

III. FILING THE COMPLAINT

When drafting a wage and hour complaint under the FLSA and/or analogous state laws, plaintiffs' counsel must make numerous strategic decisions that will directly affect how the case is perceived and defended by the employer, the scope of discovery that will be permitted, and, most importantly, the substantive standards of law that will be applied by the court. These decisions include determining: (1) the venue in which the case should be filed, (2) whether to plead the case as an individual action, a collective action under the FLSA, a class action under state law, or a hybrid collective/class action under the FLSA and state laws; and (3) whether to include all employees that plaintiffs' counsel currently represent as named plaintiffs. Of course, above all, plaintiffs' counsel must be sure to plead their claims sufficiently to avoid dismissal under Rule 12(b).

A. Pleading to Avoid Dismissal

Section 207(a) of the FLSA requires that employers pay their employees one and one-half (1.5) times their regular rate of pay for any hours worked in excess of forty hours per week, unless the employer can prove that an exemption applies. 29 U.S.C. § 207(a)(1). Therefore, to survive a motion to dismiss, "a plaintiff must plead (1) that he worked overtime hours without compensation; and (2) that the employer knew or should have known that he worked overtime but failed to compensate him for it." *See, e.g.*, *Butler v. DirectSat USA, LLC*, 800 F. Supp. 2d 662, 667 (D. Md. 2011). Under Federal Rule of Civil Procedure 8(a)(2), a "plausible" claim contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *see also Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that the allegations in the complaint are true (even if doubtful in fact)." (internal citation omitted)).

Notably, federal courts have diverged on the degree of specificity needed to state an overtime claim. *See* *Butler*, 800 F. Supp. 2d at 667 (recognizing that "courts across the country have expressed different views as to the level of factual detail necessary to plead a claim for overtime compensation under the FLSA."). For example, some courts have required an approximation of the total uncompensated hours worked during a given workweek in excess of forty hours. *See, e.g.*, *Nichols v. Mahoney*, 608 F. Supp. 2d 526, 547 (S.D.N.Y. 2009); *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 628 (S.D.N.Y. 2007). These courts have dismissed FLSA claims because the plaintiffs have failed to provide any facts or estimates to support the number of hours they worked and had simply "rephrased" the FLSA's requirements as factual contentions. *See* *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 114 (2d Cir. 2013); *Spataro v. GEICO*, No. 13-CV-5020(JS)(ARL), 2014 U.S. Dist. LEXIS 109068, at *9 (E.D.N.Y. Aug. 6, 2014) ("The Amended Complaint provides no facts to support this allegation [that GEICO discouraged him and other adjusters from reporting overtime], such as an estimate of hours Plaintiff failed to report or who allegedly discouraged adjusters from reporting overtime.").

Other courts, on the other hand, have not required an estimate of overtime worked, and found the basic allegation that plaintiffs worked more than forty hours a week and did not receive overtime compensation to be sufficient. *See, e.g.*, *Hawkins v. Proctor Auto Serv. Ctr.*, No. RWT-09-1908, 2010 U.S. Dist. LEXIS 30772, at *1 (D. Md. Mar. 30, 2010); *Uribe v. Mainland Nursery, Inc.*, CA No. 07-0229, 2007 U.S. Dist. LEXIS 90984, at *3 (E.D. Cal. Dec. 11, 2007) (concluding that plaintiffs who alleged they were non-exempt employees who had not been compensated at the appropriate overtime rates had satisfied pleading standards); *Xavier v. Belfor USA Group, Inc.*, CA No. 06-491 et al., 2009 U.S. Dist. LEXIS 11751, at *5 (E.D. La. Feb. 13, 2009) (concluding that plaintiffs' allegations they routinely worked more than forty hours per week, were not paid overtime compensation, and were covered employees were sufficient to state a claim); *Qureshi v. Panjwani*, No. 08-3154, 2009 U.S. Dist. LEXIS 48142, at *3 (S.D. Tex. Jun. 9, 2009) (concluding plaintiffs' allegations that "they were required to work in excess of a forty-hour week without overtime compensation, and that they were employed by the defendants" were sufficient to state a claim under the FLSA). These courts have reasoned that, "[w]hile Defendants might appreciate having Plaintiffs' estimate of the overtime hours worked at [an early] stage of the litigation, it would be subject to change during discovery and if/when the size of the collective action grows and thus of limited value." *Butler*, 800 F. Supp. 2d at 668.

Because the pleading standard for overtime claims varies by court and circuit, plaintiffs' counsel should research the applicable pleading standards when evaluating in which venue he or she should file the case. Moreover, to be safe, plaintiffs' counsel may consider including an approximation of the hours plaintiffs worked beyond forty each week, and other specific factual allegations to support their claims for liquidated damages and a willfulness finding. For example, instead of alleging that defendants generally encouraged plaintiffs to work off-the-clock, plaintiffs' counsel should consider providing examples of the persons who encouraged off-the-clock work, and how they did so. These allegations may also include examples of defendants ignoring employees' complaints about off-the-clock work or retaliating against

employees for making such complaints. Of course, while courts will generally permit plaintiffs to replead before dismissing a case with prejudice, spending time on unnecessary motion practice should be avoided, and plaintiffs' counsel should think hard about how to plead their clients' claims.

B. Remember to File Consent Forms For the Named Plaintiffs

A costly mistake sometimes made by plaintiffs' counsel is forgetting to file consent forms for the named plaintiffs. If brought as a collective action "[t]he plain text of § 256 provides that, for a plaintiff's action to be deemed commenced, he must file a written consent to join the collective action, even if he is a named plaintiff in the complaint." *Frye v. Baptist Mem. Hosp., Inc.*, No. 07-2708, 2011 U.S. Dist. LEXIS 45606, at *10 (W.D. Tenn. April 27, 2011). "Redundant though it may seem to require consents from the named plaintiffs," the Fourth Circuit has explained, "the filing of a collective action under 29 U.S.C. § 216(b) . . . renders consents necessary." *Royster v. Food Lion*, Nos. 94-2360, 97-1443, 97-1444, 94-2645, 95-1274, 1998 U.S. App. LEXIS 11809, at *13 (4th Cir. June 4, 1998). Therefore, "[u]ntil a plaintiff, even a named plaintiff has filed a written consent, . . . he has not joined in the class action, at least for statute of limitation purposes." *Id.* at *12-13. Consequently, "courts have concluded that, where named plaintiffs in FLSA collective actions have not filed written consents within two or three years of receiving their last paychecks, . . . their FLSA claims are time-barred." *Frye*, 2011 U.S. Dist. LEXIS at *12; *see also Salazar v. Brown*, No. G87-961, 1996 U.S. Dist. LEXIS 18113, at *11 (W.D. Mich. April 9, 1996) (granting summary judgment in favor of an employer as to various named plaintiffs because "no consent has ever been filed and more than three years has elapsed since their last paycheck."). Therefore, plaintiffs' counsel should always file consent forms for the named plaintiffs as attachments to the original complaint.

C. Selecting Venue

It is not uncommon for different district and circuit courts to decide the same questions of law pertaining to the FLSA differently. Consequently, selecting the proper venue is one of the most important decisions plaintiffs' counsel makes when filing a complaint. For example, as described above, venue may not only affect the standard of pleading applied to the plaintiffs' case, but also how the plaintiffs' damages are calculated. *Compare Ransom v. M. Patel Enters., Inc.*, 734 F.3d 377, 385 (5th Cir. 2013) (applying the fluctuating workweek method when calculating damages for misclassification of employee as exempt) with *Cowan v. Treetop Enters.*, Inc., 163 F. Supp. 2d 930, 941 (M.D. Tenn. 2001) (explaining that fluctuating workweek method does not apply to misclassification cases unless the employee receives a contemporaneous payment of the half-time premium). Because the FLSA does not itself contain a venue provision, venue determinations are made based on the venue provisions that apply in the forum where the action is commenced. *Goldberg v. Wharf Constructors*, 209 F. Supp. 499 (N.D. Ala. 1962) (explaining that FLSA contains no special venue provision and general venue provisions of 28 U.S.C. § 1391 apply to suit brought under the FLSA).

Under 28 U.S.C. § 1391, a civil action may be brought in: "(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim

occurred . . .; or (3) if there is no district in which an action may otherwise be brought …, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391(b). One of the benefits of being retained by numerous employees who work(ed) for different facilities of the defendant employer across a wide geographic area is that it generally provides plaintiffs' counsel with numerous venue options. When considering these options, plaintiffs' counsel should consider the likelihood of other employees who worked in more favorable venues joining the case. If the likelihood is high, plaintiffs' counsel may consider waiting to file suit until those employees join and expand the list of potential venues.

Another issue to strongly consider before selecting a venue is how judges in a particular forum treat motions to approve FLSA settlements. While some courts will generally rely on the parties' representations concerning fairness when deciding whether to approve a FLSA settlement, other courts apply a particularly strict standard, and in some cases, will even leave the parties with few options other than to redraft and renegotiate the settlement terms. *See e.g.*, *Barnes v. Tandy Leather Company, LP*, No. 4:11-CV-335-A, Dkt. No. 53 (N.D. Tex. Apr. 11, 2012) ("If the parties wish to proceed further with a settlement, the court suggests that they start with a redrafting of the proposed settlement agreement. . . .").

Finally, plaintiffs' counsel needs to consider the location of the witnesses and the travel costs associated with litigating and trying a case in a particular venue. Even if plaintiffs' counsel files suit in a proper venue under § 1391, the employer may still seek to transfer venue under 28 U.S.C. § 1404 for the "convenience of the parties and witnesses."

D. Whether to Include All Opt-Ins As Part of Initial Complaint

Another important issue for plaintiffs' counsel to consider is whether to include all employees who they currently represent as named plaintiffs in the initial complaint or to reserve some opt-ins for strategic purposes.

The first consideration when making this decision is whether the running statute of limitations under the FLSA is reducing any of the clients' potential recovery if they do not immediately file a consent to join. *See supra* Pt. II.A. If the running statute of limitations will not reduce an opt-in plaintiff's damages, plaintiffs' counsel may consider waiting to file the consent form for strategic reasons. For example, one of the factors some courts use when considering a motion for conditional certification is whether there are other employees who are interested in joining the case. *Simmons v. T-Mobile*, No. 06-CV-1820, 2007 WL 210008, at *9 (S.D. Tex. Jan. 24, 2007) ("Others' interest in joining the litigation is relevant in deciding whether or not to put a defendant employer to the expense and effort of notice of a conditionally certified class of claimants in a collective action."). Notably, not all courts require that plaintiffs present evidence that potential opt-in plaintiffs desire to opt-in. *See e.g.*, *Walker v. Honghua Am.*, LLC, 870 F.Supp.2d 462, 470 (S.D. Tex. 2012) (collecting cases). However, to the extent a showing of interest is required to obtain conditional certification, plaintiffs' counsel may consider reserving a few consent forms so that they can be attached to plaintiffs' motion for conditional certification. To limit the defendants' ability to argue that conditional certification should be limited to a narrower geographic area, plaintiffs' counsel should select the opt-in plaintiffs to

reserve from a cross-section of employees from different locations.

E. Whether to File as an Individual Action, Collective Action, Class Action, or Hybrid Collective/Class Action

The fundamental issue of whether a claim should be pled as an individual action on behalf of a single employee or a collective or class action on behalf of a group of employees depends primarily on the number of employees who are or were subjected to the allegedly unlawful employment policy. Of course, if there is only one employee in a particular job class who was allegedly misclassified, there is no reason to pursue a class claim. However, even if the putative class is relatively large, the patience and temperament of the named plaintiffs is an important issue to consider when deciding how to plead a case. Because of the increased financial exposure created by class claims, class actions do not tend to get resolved quickly, especially if the employer is still using the challenged employment policy. It is wise for plaintiffs' counsel to explain the timeline of class-wide claims to their clients, and to obtain their commitment to the cause. Although plaintiffs are typically not too excited about prolonging a potential settlement, they tend to appreciate that there is strength in numbers and understand their potential individual recovery will likely increase if their allegations are corroborated by other similarly-situated employees. If the named plaintiffs are not committed to the case being pursued on behalf of a larger class, they will likely grow frustrated as the case moves along, and it is unlikely they will be cooperative with the duties that typically fall on the named plaintiffs.

In the event that there are a number of employees who are victims of the same allegedly unlawful policy and the named plaintiffs are willing to pursue the case as a class claim, plaintiffs' counsel must choose whether to plead the case as: (1) a FLSA collective action, (2) a state wage and hour action, or (3) a hybrid collective/class action. Notably, there can be significant advantages to asserting state law claims, as compared to FLSA claims. For example, state law claims may be pursued as class actions under Rule 23 of the Federal Rules of Civil Procedure, instead of as collective actions under 216(b) of the FLSA. Although the standard to obtain certification of a Rule 23 class is more rigorous than obtaining conditional certification under 216(b), a Rule 23 opt-out class, compared to a 216(b) opt-in class, generally increases the number of employees in the case. Moreover, the statute of limitations is tolled with the filing of the complaint under Rule 23, thus avoiding the issue of having employees reduce or eliminate their claims simply because they did not opt-in soon enough. Before selecting the procedural vehicle for pursing the available wage and hour claims, plaintiffs' counsel should carefully consider the procedural and substantive differences of each alternative.

1. State Law Claims

Many states have enacted statutes regulating employees' wages and hours, many of which grant different rights of action and more protections for employees than the FLSA. Plaintiffs' counsel should familiarize themselves with the wage and hour provisions in the jurisdictions in which a potential defendant has facilities, including:

- Overtime pay, which may require premium compensation after a certain number of hours worked per day, or for work on a specific day of the week. *See e.g.*, Cal. Lab. Code § 551

(requiring daily overtime for hours worked in excess of eight a day, as well as mandatory overtime for work on the seventh day in any workweek); AK Stat. § 23.10.060 (requiring overtime pay for hours in excess of eight hours in a single workday).

- Minimum wages (which can be higher than the $7.25 mandated by the FLSA). *See, e.g.*, Alaska, Arizona, Colorado, California, Connecticut, Delaware, D.C., Florida, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin.

- Meals and/or rest breaks (for example, the following states have adopted laws permitting employees to take meal and/or rest breaks during work hours: California, Colorado, Connecticut, Delaware, Georgia, Illinois, Kentucky, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New York, Oregon, and Tennessee).

- The damages available to a successful plaintiff. *See e.g.*, Maryland Lab & Emp Code 3-502, 3-507.1 (allowing treble damages); N.C. Gen. Stat. §§ 95-25.1 et seq. (allow double damages plus interest on lost wages).

2. Hybrid FLSA/State Law Claims

In some cases, plaintiffs seek to pursue both FLSA and state wage and hour claims in a single case in federal court. In such cases, the federal court generally has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a). However, it is not uncommon for defense counsel to challenge the federal court's jurisdiction over the state law claims. "In such dual-filed wage actions, plaintiffs seek certification of a state opt-out class under Fed. R. Civ. P. 23 and a similarly-defined opt-in class under section 216(b)." MATTHEW W. LAMPE AND E. MICHAEL ROSSMAN, *Procedural Approaches for Countering Dual-Filed FLSA Collective Action and State Law Wage Class Action*, Vol. 20, No. 3 Lab. Law 311, 315 (Winter/Spring 2005). Under this approach, application of Rule 23 to the state claims serves as a vehicle to avoid the FLSA's opt-in requirement, since all persons falling with the Rule 23 class definition will be swept into the case if class certification is granted. *Id.* At the same time, application of section 216(b) to the FLSA claim provides something of a hedge against the possibility that Rule 23 certification will be denied, and preserves the possibility of early notice. *Id.* "Indeed, the settlement leverage that plaintiffs gain through section 216(b) notice dramatically increases if the possibility of a large Rule 23 class is also looming." *Id.*

Plaintiffs' counsel should carefully analyze whether to file hybrid FLSA/state law claims in federal court or to pursue these claims separately in state court or federal court in the state whose laws give rise to the claim. Some considerations in making this decision are the number of potential plaintiffs involved in the state action, the similarity between the state and FLSA claims; and the degree to which courts in each jurisdiction are receptive to class claims and hybrid actions. Because of the complexity and potential exposure when faced with hybrid actions, defense counsel will typically respond with aggressive tactics, including seeking to decertify the FLSA action, seeking to have the court decline supplemental jurisdiction, and/or moving for a multi-district litigation panel. On the other hand, a plaintiff who separately litigates her federal

and state wage claims may be accused of claim splitting. *See, e.g.* *Fernandes v. Quarry Hills Assocs., L.P.*, 2010 U.S. Dist. LEXIS 136884 (D. Mass. Dec. 28, 2010).

IV. CASE SCHEDULING

Shortly after the case is filed, plaintiffs' counsel will need to decide how they want to schedule or manage the case. In deciding this, counsel will need to consider a number of issues, including those discussed below.

A. Discovery Bifurcation

Discovery can be, but is not always, bifurcated in class actions. If discovery is bifurcated, during the first stage, the parties typically will exchange discovery relevant to class certification. After a decision on class certification, merits and damages discovery will commence. Those advocating for bifurcation justify it by claiming efficiency and minimization of unnecessary expense. *See* Manual for Complex Litigation (Fourth) § 21.14 (2004) ("Discovery relevant only to the merits delays the certification decision and may ultimately be unnecessary. [Accordingly,] courts often bifurcate discovery between certification issues and those related to the merits of the allegations."). Ideally, the bifurcation of discovery will permit plaintiffs to efficiently obtain targeted discovery, allowing for earlier motions for conditional and/or class certification.

However, any agreement to bifurcate needs to recognize that some merits discovery will necessarily occur during class discovery. "Plaintiff must be given 'an opportunity to present evidence as to whether a class action [is] maintainable,' and such an opportunity requires 'enough discovery to obtain the material.'" *Edwards v. First Am. Corp.*, 385 Fed. Appx. 629, 631 (9th Cir. 2010). And this includes discovery into any merits which overlap with the Rule 23(a) requirements. *See* *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (in deciding a Rule 23 motion, "a district court *must* consider the merits if they overlap with the Rule 23(a) requirements"). *Cf.* Fed. R. Civ. P. 23, Advisory Committee Notes to the 2003 Amendments- ("Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between 'certification discovery' and 'merits discovery.'").

B. Scheduling of FLSA Conditional Certification Motion

Plaintiffs should typically seek to move for conditional certification of an FLSA collective as soon as they have sufficient evidence to meet the lenient standard for showing that collective members are similarly situated. In straightforward cases, this can be done early in the case based upon the declarations of the named and opt-in plaintiffs. Plaintiffs should be cautious of extensive delay or discovery prior to conditional certification. As discussed above, potential collective members' claims are not tolled during the pre-certification period. Moreover, some courts have held that "substantial" pre-certification discovery justifies a "heightened standard" at the conditional certification stage. *See infra* Pt. VI.A.

C. Scheduling of Rule 23 Class Certification Motion

Motions for class certification under Rule 23 should be brought "[a]t an early practicable time after a person sues . . . as a class representative . . . ." Fed. R. Civ. P. 23(c)(1)(A). As a practical matter, however, such motions are generally brought after plaintiffs have obtained conditional certification under the FLSA. This makes sense given that the standard for conditional certification under the FLSA is far lower than the standard for certification under Rule 23, and discovery obtained prior to and following conditional certification will likely be highly relevant to class certification under Rule 23. Notably, putative Rule 23 class members' claims are tolled prior to class certification. *See* *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

That said, plaintiffs' counsel should provide for sufficient time to move for class certification under Rule 23 prior to moving for summary judgment. This is the avoid the "one-way intervention" issue. "One-way intervention" refers to the situation in which a plaintiff intervenes "in a class action after an adjudication favoring the class had taken place. Such intervention is termed 'one way' because the plaintiff would not otherwise be bound by an adjudication in favor of the defendant." *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995). Generally speaking, a defendant can object if a plaintiff engages in one-way intervention, *i.e.* moving for summary judgment before class certification under Rule 23.[1]

V. STRATEGIES FOR CONDITIONAL CERTIFICATION

The collective action mechanism under the FLSA serves the dual purpose of lowering litigation costs for individual plaintiffs, and decreasing the burden on the courts through "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Notably, conditional certification generally "requires little more than substantial allegations, supported by declarations or discovery, that the putative class members were together the victims of a single decision, policy, or plan." *Coates v. Farmers Grp., Inc.*, 2015 U.S. Dist. LEXIS 165817, at *18 (N.D. Cal. Dec. 9, 2015). Nevertheless, the more evidence that plaintiffs can present showing that collective members are "similarly situated," the better. The following types of evidence and strategies for obtaining that evidence may bolster and contribute to the success of motions for conditional certification under the FLSA.

- Move early. *See infra* Pt. VI.A.

- Interview opt-in plaintiffs immediately upon receipt of their consent forms and use the interview notes to draft a declaration in support of conditional certification for

[1] The rule against one-way intervention is designed to protect defendants; accordingly, defendants can waive one-way intervention in writing or through litigation conduct. *See* *Schwarzschild*, 69 F.3d at 295 (defendants permitted to waive one-way intervention protection and move for summary judgment before the class has been properly certified; however, if success, defendants' motion will only bind the named plaintiffs); *cf.* *Hartley v. Suburban Radiologic Consultants, Ltd.*, 295 F.R.D. 357, 369 (D. Minn. 2013) (if after waiving the protection, a defendant unsuccessfully moves "for summary judgment prior to class certification, no final determination has been made of the merits of the case, and putative class members know only that they have a chance of prevailing at trial.").

each opt-in plaintiff. Opt-in plaintiffs are generally most interested in the case at the time that they send in their consent forms, so that is the best time to get information from them. The more declarations filed with the motion for conditional certification, the better.

- Locate any statements that defendants have made that apply equally to all putative collective members. For example, defendant may have a written job description that lists the same duties and classification status for all putative collective members. As another example, defendants may have made similar statements in their course of business to regulating entities and those statements may be publicly available. Similarly, such statements may be found in a defendant's answer to the complaint. All of this is evidence and can be filed with plaintiff's motion for conditional certification.

- Paystubs from the named and opt-in plaintiffs can also be helpful in that they may show uniform calculations or treatment of certain hours. These, too, can be filed in support of conditional certification.

Critically, the benefits of a collective action "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Hoffmann-La Roche*, 493 U.S. at 170. When moving for conditional certification, plaintiffs' counsel should remember to file a proposed notice and advocate for its adoption, as well as for the production of the names and contact information of putative collective members.

VI. DISCOVERY

A. Conduct As Little Discovery as Necessary Before Filing Motion for Conditional Certification

As alluded to above, courts typically follow the two-step process developed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), when determining whether to authorize notice to employees of their right to join a collective action. During the first step, known as the notice stage, the court "makes a decision—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members." *See Tolentino v. C & J Spec-Rent Services Inc.*, 716 F. Supp. 2d 642, 647 (S.D. Tex. 2010) (citation omitted). Because the court has minimal evidence, this determination is made using a fairly lenient standard and typically results in 'conditional certification' of a representative class. *Id*. However, some courts have justified applying a stricter standard where significant discovery had been completed. *Cf. Renfro v. Spartan Computer Servs., Inc.*, No. 06-2284-KHV, 2007 U.S. Dist. LEXIS 45157, at *12 n.4 (D. Kan. June 20, 2007) ("the Court is not inclined to apply the heightened second stage certification analysis on the minimal amount of discovery before it.").

For example, in *Basco v. Wal-Mart Stores, Inc.*, "in light of the substantial discovery that ha[d] occurred," the court decided to apply the more rigorous standard that is typically applied during the second decertification step of the *Lusardi* approach. No. 00-3184, 2004 U.S. Dist. LEXIS

12441, at *1-5 (E.D. La. July 2, 2004). The court noted that, "[b]ecause the aim of collective actions is to promote judicial economy, and substantial discovery has already been taken such that the Court can make an educated decision as to whether certifying this matter as a collective action would survive the decertification process, the ends of judicial economy . . . require the Court to make that enquiry at this stage." *Id*. at *14. The court ultimately denied the plaintiffs' motion for conditional certification based in large part on the plaintiffs' deposition testimony, which highlighted that any alleged FLSA violations were occurring "on a manager-by-manager and associate-by-associate basis involving particular circumstances and anecdotal testimony" rendering the claims and potential defenses too individualized for class treatment." *Id*. at *21.

Therefore, there is a substantive advantage to filing a motion for conditional certification as early in the litigation as possible, and before engaging in substantial discovery. Notably, "[t]he court is not obligated to wait for the conclusion of discovery before it certifies the collective action and authorizes notice." *Iglesias-Mendoza v. La Belle Farm*, 239 F.R.D. 363, 368-69 (S.D.N.Y. 2007). Consequently, if plaintiffs' counsel has numerous plaintiffs who are capable of signing supporting declarations, counsel should strongly consider filing their motion for conditional certification immediately after the defendant files their answer.

B. Pre-Conditional Certification Discovery of Similarly-Situated Employees

Discovery in FLSA collective actions may be conducted both before and after conditional certification. In the event that plaintiffs' counsel only represents one or a limited number of employees, to increase the likelihood that the court will grant conditional certification, it may be important for counsel to learn the identity of other employees who were also subjected to the allegedly unlawful employment policy at issue. This information will assist plaintiffs in understanding the scope and similarity of the alleged violations within the employer's workplace, and to demonstrate interest from other employees in joining the case. However, unsurprisingly, employers are not eager to disclose this information. Therefore, plaintiffs' counsel may be forced to file a motion to compel seeking that the employer disclose the identities and contact information for similarly-situated employees.

Courts disagree as to whether a plaintiff is entitled to discovery of the identities and contact information for similarly-situated employees. On the one hand, some courts hold that discovery requests concerning similarly-situated employees are premature prior to conditional certification. *See, e.g.*, *Stephens v. Erosion Containment Mgmt., Inc*., No. 8:07-CV-1995-T-30MAP, 2008 WL 2157095, at *1 (M.D. Fla. May 21, 2008); *Recinos-Recinos v. Express Forestry, Inc*., No. Civ.A. 05-1355, 2006 WL 197030, at *12-13 (E.D. La. Jan. 24, 2006). Other courts, however, have allowed plaintiffs to obtain through discovery the identity and contact information of allegedly similarly-situated employees. *See, e.g.*, *Miklos v. Golman-Hayden Cos.*, No. CIV.A.2:99-CV-1279, 2000 WL 1617969, *2 (S.D. Ohio 2000) (allowing discovery "to identify those employees who may be similarly situated and who may therefore ultimately seek to opt into the action"); *Hammond v. Lowe's*, 216 F.R.D. 666, 673 (D. Kan. 2003) (allowing discovery of identity information and other information designed to test whether the other employees were similarly situated); *Whitehorn v. Wolfgang's Steakhouse, Inc.*, No. 09 Civ. 1148(LBS), 2010 WL 2362981, at *2 (S.D.N.Y. June 14, 2010) (stating that as to the discovery of pre-certification contact information, "the weight of authority in this district counsels in favor of allowing such disclosure

in FLSA cases." (citations omitted)). These courts have concluded that requests for contact information of similarly situated employees fall within the broad purposes of discovery. See Adv. Com. Notes, 1946 Amendment, R. 26, Fed. R. Civ. P. (indicating that "[t]he purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case").

C. Scope of Post-Certification Discovery of Opt-In Plaintiffs

An issue that frequently arises after a court grants conditional certification is whether the defendant is entitled to propound individual written discovery on and/or to depose every opt-in plaintiff. Depending on the number of opt-in plaintiffs, such discovery could impose substantial costs on plaintiffs' counsel. Fortunately, numerous courts have sided with plaintiffs' counsel in their efforts to limit discovery to named plaintiffs or to named plaintiffs and a smaller subset of opt-in plaintiffs. *See e.g.*, *Morales-Arcadio v. Shannon Produce Farms*, No. CV605-062, 2006 U.S. Dist. LEXIS 66595, at *11 (S.D. Ga. Sept. 11, 2006); *McGrath v. City of Philadelphia*, No. 92-4570, 1994 U.S. Dist. LEXIS 1495, at *8 (E.D. Pa. Sept. 9, 1994) ("It is well-established that individualized discovery . . . is inappropriate in a [FLSA] class action lawsuit."); *Adkins v. Mid-America Growers Inc*., 141 F.R.D. 466, 468-69 (N.D. Ill. 1992) (concluding that individualized discovery of all opt-in plaintiffs is inappropriate in a FLSA collective action, but representative testimony is permissible); *Smith v. Lowe's Home Centers, Inc*., 236 F.R.D. 354, 357-58 (S.D. Ohio 2006) (denying defendant's request for individualized discovery of more than 1,500 opt-ins and instead ordering a representative sample); *Geer v. Challenge Financial Investors Corp*., 2007 U.S. Dist. LEXIS 33499, at *13 (D. Kan. May 4, 2007) (admonishing defendant for seeking depositions of all 256 opt-ins and its failure to compromise with plaintiffs).

D. Location of Opt-In Plaintiffs' Depositions

It is not uncommon for defense counsel to attempt to reduce the size of a multi-state class by insisting that opt-in plaintiffs' depositions occur in the judicial district where the case is pending, rather than in the district where the opt-in plaintiffs reside. Fortunately, numerous courts have rejected such efforts. For example, in *Brasfield v. Source Broadband Services, LLC*, the court noted that the opt-in plaintiffs "did not choose the forum; the forum was chosen for them." 255 F.R.D. 447, 450 (W.D. Tenn. May 23, 2008). The court went on, "[h]ad the opt-in plaintiffs not joined the suit, they would be forced to file an individual suit in their home forum, thus destroying the benefit to the judicial system of a collective action and efficient resolution of the matter." *Id*. Therefore, the *Brasfield* court refused to require the out-of-state opt-in plaintiffs to travel to Memphis where the case as filed for their depositions because, "considering the policy behind the FLSA encouraging collective actions so that plaintiffs may pool their resources, requiring the out-of-state opt-in plaintiffs to travel to Memphis for a deposition would place a burden on them that would cancel much of the benefit gained by joining in the collective action." *Id*.; *see also Smith v. Family Video Movie Club, Inc*., No. 11 C 1773, 2012 U.S. Dist. LEXIS 142827, at *7 (N.D. Ill. Sept. 27, 2012) ("Requiring such plaintiffs to travel to this judicial district would be burdensome and would undermine the benefits of the collective FLSA action."); *Gee. v. Suntrust Mortgage, Inc*., No. 10-cv-01509 RS (NC), 2011 U.S. Dist. LEXIS 131935, at *7 (N.D. Cal. Nov. 15, 2011) (concluding that the advantages of collective actions "would be significantly reduced or even eliminated if the proposed deponents are required to

travel hundreds of miles for their depositions").

VII. STRATEGIES FOR EFFECTIVE MOTION PRACTICE

Dispositive motion practice is a routine part of wage and hour litigation. Plaintiffs' counsel should strive for clear briefs and present facts and law in an organized manner. Below are some strategies specific to class certification, summary judgment, and decertification.

A. Rule 23 Class Certification

The Rule 23 class certification briefing strategy is similar to the conditional certification standard in that its focus is on the similarity of the circumstances of all of the employees in question, but the bar for plaintiffs to win class certification is significantly higher. At this stage, the court generally does not consider the merits of the claim, but merely whether the merits can be resolved—win or lose—on a class-wide basis. *See, e.g.*, *Amgen v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1194-95 (2013). Although the briefing is typically organized by the Rule 23 (a) and (b) requirements (i.e., numerosity, typicality, adequacy, commonality, predominance, and superiority), the thrust of argument aims to show the court that the liability questions at issue can be resolved on a class-wide basis using common proof.

The nature of the proof supporting the motion will depend on the claims at issue. If the case alleges misclassification of employees for whom the level of "discretion and independent judgment" is a relevant factor, as in the administrative exemption, the class certification motion will focus on common forms of proof showing that the degree of discretion and independent judgment afforded to the class members is the same or sufficiently similar throughout the class. Such proof often takes the form of: centrally-promulgated policies and procedures that dictate the responsibilities and authority of the class members; exemplars of the work that the employees produce in order to show that the work—and thus the amount of discretion afforded in completing it—is similar throughout the class; digital records showing the tasks employees were performing and the time spent on those tasks; class member declarations describing the nature of the job performed by each declarant; and deposition testimony from company witnesses.

Defendants will focus their opposition on the purported existence of individualized issues that would prevent the court from deciding liability on a class-wide basis. Common arguments are that the relevant facts differed from one location to another or from one supervisor to another. When an exemption depends upon the amount time spent on certain tasks, defendants will argue that the only method of determining liability for a given class member would be to examine individualized proof concerning the amount of time he or she spent on that task.

Plaintiffs' counsel can use depositions and briefing techniques to show that class treatment is appropriate. In depositions, management witnesses (especially lower-level witnesses who are not polished, repeat-deponents) can often be elicited to discuss the relevant job position in general terms. For example, if a witness is questioned about what the job of a sales representative entails, he or she will usually launch into an answer. While that answer may have an employer-friendly bias, by answering the question, the witness has shown that the answer can be generalized for all sales representatives. Similarly, when writing the opening brief, plaintiffs' counsel can argue the merits of the case while also arguing that the relevant facts will be the

same for all class members. Defendants may find it difficult to resist making responding arguments on the merits, thus implicitly conceding that the merits can be argued on a class-wide basis.

As a general matter, arguments by defendants focusing on individualized damages questions will not succeed in defeating class certification if liability is amenable to class adjudication. *See, e.g.*, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510 (9th Cir. 2013). Courts have adhered to this principle following the Supreme Court's ruling in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), an antitrust case often raised by defendants in opposition to certification. In *Comcast*, the plaintiffs affirmatively relied on a class-wide damage calculation methodology that did not align with the theory of liability at issue in the case. Accordingly, courts have viewed *Comcast* for the narrow proposition that a model purporting to serve as evidence of damages must actually measure the damages attributable to the theory of liability giving rise to such damages. *See, e.g.*, *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402-07 (2d Cir. 2015); *see also Leyva*, 716 F.3d at 514.

Defendants opposing class certification also often cite *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In *Dukes*, resolution of the plaintiffs' gender-based Title VII claims, brought under Rule 23(b)(2), depended on the *reasons* for each particular employment decision made by thousands of different managers across the country. *Id.* at 342-352. The plaintiffs wanted to sue over "literally millions of employment decisions at once," but the Supreme Court explained that "without some glue holding the alleged reasons for all those decisions together, it [would] be impossible to say that examination of all the class members' claims for relief [would] produce a common answer to the crucial question *why was I disfavored.*" *Id.* *Dukes*, however, has not proved to be the death-knell to employment class actions that defendants had hoped, even in the context of Title VII discrimination. *See, e.g.*, *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015); *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. Of City of Chi.*, 797 F.3d 426 (7th Cir. 2015); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012). At best, as to wage and hour cases, *Dukes* shows the importance of adducing common, centralized evidence upon which the claims will be proved, rather than relying on decentralized, subjective decision-making by lower-level managers.

More recent case law is promising for plaintiffs. Specifically, the Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) provides important guidance for plaintiffs introducing statistical or representative proof. *Tyson* was an off-the-clock case, in which workers in a meat-processing plant alleged that they were not paid for certain donning, doffing, and related activities. The plaintiffs introduced statistical expert evidence at trial, based on a sample of employees, concerning the length of time needed to complete the allegedly uncompensated activities. The Court affirmed the jury verdict for the plaintiffs on liability, approving the use of representative evidence and rejecting the defendant's request for a "categorical exclusion" of the use of representative evidence. In doing so, the Court affirmed the longstanding rule it articulated in Anderson v. Mt. Clemens Pottery Co., 66 S. Ct. 1187 (1946), i.e., that where an employer fails to keep records of hours worked, an employee may prove his hours worked by just and reasonable inference, which may include representative proof. As applied to class-wide liability, the Court in *Tyson* explained:

> Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as [the plaintiffs' expert conducted] has been permitted by the Court so long as the study is otherwise admissible.

136 S. Ct. at 1049 (citing *Mt. Clemens*).

B. Summary Judgment

In many wage and hour cases, plaintiffs' counsel is presented with the opportunity to affirmatively move for summary judgment on liability. In rare cases, where a defendant's time and pay records are complete, plaintiffs' counsel may also be able to move for summary judgment on damages. Some strategies for enhancing the persuasiveness of summary judgment briefs include:

- Including direct quotes from the defendant's witnesses in plaintiffs' statement of facts.
- Summarizing exhibits into an easily readable form, consistent with Fed. R. Evid. 1006.
- Using an expert to support calculations based on payroll, provided that any expert disclosure requirements are followed.
- Cutting and pasting key documentary evidence into the statement of facts and/or argument section.
- Affirmatively addressing why decisions that favor defendants are outliers, inapposite, or wrong
- Providing an index of exhibits with courtesy copies for ease of accessibility.
- Using a chart or other graphic to amplify any disputes in a defendant's statement of facts.

Recent opinions where plaintiffs have prevailed on summary judgment include *Boyd v. Bank of Am. Corp.*, 109 F. Supp. 3d 1273 (C.D. Cal. 2015) (granting employees' motion for partial summary judgment as to inapplicability of administrative and professional exemptions).

C. Decertification

Defendants typically move to decertify the conditionally certified FLSA collective at the close of discovery. The timing presents opportunities for plaintiffs' counsel, given that knowledge that counsel will have accrued during discovery, the closeness of trial, and the fact that, in misclassification cases, defendants typically argue that they classified all class and collective members correctly. Strategies to consider when responding to a motion for decertification include:

- Pointing out the tension between a defendant's motion for decertification and its instance that its classification decision was uniformly correct. *See* *Monroe v. FTS USA, LLC*, 763 F. Supp. 2d 979, 985 (W.D. Tenn. 2011) ("The Court agrees with Plaintiffs that Defendants' motion for summary judgment is in tension with their motion to decertify since one seeks to conclude the case on a classwide basis while the other argues that classwide adjudication is improper.").

- In the Rule 23 context, relying on earlier decisions by the court that apply to all class members. *See* *U.S. v. City of New York*, 07-CV-2067 NGG RLM, 2011 WL 2259640 (E.D.N.Y. June 6, 2011) ("[I]ssues common to the class that are resolved earlier in the litigation remain 'common' in later phases.").

- Submitting a fully developed trial plan or mock verdict form to show the court how the case can be tried on a class or collective basis.

- Focusing on common proof. *See e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008) (denying decertification and surveying the common proof).

- Presenting expert testimony showing how damages can be calculated for each and every class and/or collective member. *See* *Hart v. Rick's Cabaret Int'l, Inc.*, 60 F. Supp. 3d 447, 472 (S.D.N.Y. 2014) (denying decertification where plaintiffs did not intend to rely on individual testimony but on expert's computerized damages model based on defendant's payroll and time-keeping data).

- Recent decisions favoring plaintiffs on issues related to decertification and/or upholding class/collective verdicts in the face of arguments about "individualized issues" include: *Tyson*, 136 S. Ct. 1036; *Monroe v. FTS USA, LLC*, No. 14-6063, 2016 WL 814329 (6th Cir. Mar. 2, 2016); *Hart*, 60 F. Supp. 3d at 472.

VIII. TRIAL STRATEGIES

While a full a course could be taught on trial strategies for wage and hour class and collective actions, two key issues are outlined below.

A. Representative Evidence

As discussed above, the Supreme Court recently reaffirmed the use of representative or statistical evidence in proving wage and hour class actions at trial. *See supra* Pt. VI.A. Accordingly, in any class action alleging that defendants failed to properly pay employees for unrecorded hours, plaintiffs' counsel should strongly consider retaining an expert who can calculate or estimate the amount of uncompensated hours worked by class members through the use of representative and/or common proof. However, plaintiffs' counsel should be aware that their expert's conclusions will need to withstand *Daubert* scrutiny. See *Tyson*, 136 S. Ct. at 1048 (recognizing that a defendant may challenge expert representative evidence as "statistically inadequate or based on implausible assumptions counsel not lead to a fair or accurate estimate of the

uncompensated hours" under *Daubert*); *Villalpando v. Exel Direct Inc.*, Nos. 12-cv-04137-JCS, 13-3091-JCS, 2016 U.S. Dist. LEXIS 53773, at *26 (N.D. Cal. Apr. 21, 2016) ("the standard under *Daubert* is the same regardless of whether or not the Mt. Clemens rule applies").

B. Jury vs. Bench Trial

While plaintiffs typically want to bring their claims before a jury, consideration should be given to the possible benefits of a bench trial. Classification issues and payment issues can be very confusing to non-lawyers. It is not uncommon for a layperson to believe that salaried workers are not entitled to overtime, that high tip-earners are not entitled to wages, that a worker can contract away her rights, or that class and collective actions are lawyer-generated and have no merit. Accordingly, in jury trials, common motions *in limine* brought by plaintiffs' counsel include motions to preclude testimony and evidence about: any contract or waiver of FLSA rights; the standard in the industry where defendant does business; how plaintiffs or opt-in plaintiffs learned about or joined the lawsuit; the amount of money that plaintiffs or opt-in plaintiffs earned; and plaintiffs' or opt-in plaintiffs' taxes. In some instances, a bench trial may be preferable than risking a loss on one of these motions and/or the presentation of confusing information.

IX. AVOIDING PROBLEMATIC SETTLEMENT PROVISIONS AND OVERCOMING BARRIERS TO SETTLEMENT

It is widely accepted that FLSA settlements must be presented to the district court for approval. *See generally* *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015) (surveying case law). When presented with a motion for settlement approval, the court is to determine whether a proposed settlement is a "fair and reasonable resolution of a bona fide dispute." *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350 (11th Cir. 1982). Notably, district courts have found that certain settlement provisions render a settlement unfair and unreasonable.

For example, courts generally will not endorse a settlement of FLSA claims if that settlement requires that its terms be kept confidential. *See e.g.*, *Martinez v. Gulluoglu LLC*, 2016 WL 206474 (S.D.N.Y. Jan. 15, 2016); *Dees v. Hydradry, Inc.*, 706 F. Supp. 2d 1227, 1242 (M.D. Fla. 2010). As another example, settlements that release claims beyond those brought in the case are also routinely rejected. *See e.g.*, *Kraus v. PA Fit II, LLC*, ___ F. Supp. 3d ___, 2016 WL 125270 (E.D. Pa. Jan. 11, 2016) **("**[T]he so-called 'global' nature of the Agreement does not excuse the parties from properly delineating the waiver of Plaintiff's FLSA claims in a reasonable manner consistent with the FLSA."). Releasing FLSA claims, too, can be problematic in a Rule 23 class action context given the established principle that "only those plaintiffs how expressly join the [FLSA] collective action are bound by its results." *McElmurry v. IBM Bank Nat. Ass'n*, 495 F.3d 1136, 1139 (9th Cir. 2007). Settlements for an unexpectedly low value can also meet with judicial skepticism. *See e.g.*, *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170 (S.D.N.Y. 2015).

Despite this, defense counsel often insist upon confidentiality or overly broad release provisions, or simply refuse to pay an amount in the range expected by plaintiffs' counsel. Plaintiffs' counsel are not without strategies for overcoming such barriers to settlement.

As to confidentiality, the parties could agree that they will draft a joint press release, thereby limiting media exposure. The parties could also agree that, with the exception of any notices to the collective members, the settlement will remain confidential until such time as final settlement approval is granted by the court. This allows a defendant to speak with its customers or investors prior to the settlement becoming public knowledge.

As to the release, in hybrid cases with a Rule 23 component, courts may agree to a release that is tied to the "factual predicate" alleged in the complaint—even if that arguably creates a release of more than the FLSA claims. To further accommodate a defendant's concern about future liability, the parties could agree to a supplemental notice process under which people who are not currently part of the collective could opt into the collective and accept settlement in exchange for a release of their claims.

Finally, as to the settlement amount, plaintiffs' counsel should closely examine the risk of continuing litigation and balance that against the amount offered. If the case is strong and the defendant will be able to pay a judgment, plaintiffs' counsel should not rush into settlement. However, there are instances in which a low settlement amount can be justified. Note that plaintiffs' counsel can insist upon confirmatory discovery as part of settlement, which may be used to explain to a reviewing court that counsel did, in fact, verify any risk, defendant's financial condition, and/or the size of potential damages prior to moving for settlement approval.

X. CONCLUSION

Wage and hour litigation is complex and fast moving. The strategies above are designed to help newer practitioners navigate the complexities of wage and hour litigation. There is rarely a one-size-fits-all approach and practitioners are encouraged to reach out to fellow NELA members for assistance.